MCI Telecommunications Corporation

1801 Pennsylvania Avenue, NW
Washington, DC 20006

ORIGINAL

September 5, 1996

Mr. William F. Caton, Acting Secretary
Federal Communications Commission
1919 M Street, N.W. -- Room 222
Washington, DC 20554

DOCKET FILE COPY ORIGINAL

Re: Ex Parte CC Docket No. 96-98; RM9101 - Implementation of the Local Competition Provisions of the Telecommunications Act of 1996

Dear Mr. Caton:

A copy of the enclosed was delivered today to Jake Jennings, Radhika Karmarkar, Wendy Lader, Don Stockdale and Richard Welch of the Common Carrier Bureau for inclusion in the record in the above referenced proceeding.

Two copies of this Notice are being submitted to the Secretary of the FCC in accordance with Section 1.1206(a)(1) of the Commission's Rules.

Sincerely,

Amy G. Zirkle

Amy G. Zirkle

Enclosure

cc: Jake Jennings
Radhika Karmarkar
Wendy Lader
Don Stockdale
Richard Welch

THE COMMISSION'S AUTHORITY TO PROMULGATE RULES RELATING TO PERFORMANCE REPORTING AND STANDARDS

The recent decision of the Court of Appeals for the Eighth Circuit in Iowa Utilities Board v. FCC, No. 96-3321, slip op. at 131, 140 n.33 (8th Cir. July 18, 1997) is fully consistent with a Commission rulemaking governing ILEC performance reporting and standards. The court explicitly affirmed the FCC's authority to issue regulations relating to unbundling of elements including OSS, as well as FCC rules requiring ILECs to modify their networks to make unbundled elements available to new entrants. Iowa Utilities Board, slip op. at 131, 140 n.33. The court rejected the BOCs' argument that they should not have to modify their OSS to facilitate competition. Id. (quoting First Report and Order, ¶ 198). Indeed, because the BOCs' OSS historically were not used to interface with local competitors, BOC OSS necessarily must be modified in order to permit access to new entrants. Rules governing the performance of OSS are necessary to implement and give meaning to the Act's requirement that unbundled elements, including OSS, be provided to new entrants.

In addition, the fact that the court struck down the "superior network" rules on the merits, not on jurisdictional grounds, confirms that the court did not question the FCC's authority to promulgate rules requiring access to OSS at parity. It is that unquestioned authority that underlies rules relating to performance measures.

In their comments on LCI's Petition for Rulemaking (RM 9101), the Bell Operating Companies have raised several other specious objections to the Commission's authority. A summary and analysis of each argument is outlined below.

1. The BOCs rely on the 8th Circuit's statement that CLECs are entitled only to unbundled access to the ILEC's existing network, not a "yet unbuilt superior" network. They argue that based on this statement ILECs cannot be required to upgrade their networks at all.

Response: To the contrary, the court explicitly affirmed the FCC's authority to issue regulations relating to unbundling of elements including OSS, as well as FCC rules requiring ILECs to modify their networks to make unbundled elements available to new entrants. Iowa Utilities Board, slip op. at 131, 140 n.33. The Commission therefore retains full authority to require to access to resale and unbundled elements at parity and on reasonable terms.

In addition to the Act's requirement of parity, ILECs must provide access to unbundled elements and resale on reasonable terms. The BOCs' argument ignores the Act's separate, minimum requirement of "reasonable" service. The Commission retains full authority to fulfill the Act's requirement that OSS be provided on reasonable terms, which is not akin to requiring performance of "superior quality." Thus, for example, requiring PacBell to provide loops to CLECs in less than 30 days is not a requirement for "superior quality" service, but is necessary to fulfill the requirement of receiving access to unbundled elements on reasonable terms, *even if PacBell provisions loops to itself in less than 30 days.* A 3-day interval, for example, does not require a "superior" network, but only a minimal level of reasonable service.

2. Several BOCs argue that the FCC cannot promulgate rules that interfere with the assigned powers of the states to arbitrate interconnection issues. BellSouth relies on the court's statement in Iowa Utilities Board that "state commissions retain the primary authority to enforce the substantive terms of agreements made pursuant to sections 251 and 252," and the court's statement that the FCC cannot impose rules that thwart the negotiation process, as support for an argument that the FCC cannot circumvent the states' "primary authority" by dictating standards parties must conform to in negotiations.

FCC rules regarding performance would, according to BellSouth, effectively remove OSS from the scope of negotiations and negate the states' oversight role. If states cannot establish their own standards, they would be unable to perform the core function of approving final agreements.

Response: Like the first BOC argument, this argument ignores the fact that the court explicitly affirmed the Commission's authority to issue regulations relating to unbundled elements and OSS. The Commission's rules must follow the Act's requirement that unbundled elements be provided on reasonable, nondiscriminatory terms. The BOCs conflate the question of authority to arbitrate with the very different question whether state commissions have unfettered authority to impose substantive terms that conflict with FCC regulations. The logical extension of the BOCs' argument would be that any substantive regulation issued by the FCC would interfere with the state's right to arbitrate. The Eighth Circuit said nothing of the

kind. Background rules establishing a floor for the terms of interconnection agreements (*e.g.*, that certain elements of the local network must be unbundled) do not in any way prevent the negotiation process from occurring.

Thus, the court explicitly held that section 252(c)(1) requires state commissions to "ensure that arbitrated agreements comply with the Commission's regulations made pursuant to section 251 ..." States conduct the arbitrations, but the terms of the agreements must be consistent with the FCC's substantive regulations. Thus, there is no question that Commission rules relating to OSS trump any inconsistent state rules in the arbitration process.

The Commission also has authority to supplant state regulations made outside the context of arbitration decisions (such as a separate rulemaking) where the state rules conflict with section 251 of the Act or substantially prevent implementation of the terms of section 251 or the purposes of sections 251 through 261. Iowa Utilities Board, slip op. at 127, 129. The Commission should find that any state rules that conflict with Commission regulations relating to performance standards -- regulations that are necessary to assure access to OSS on reasonable, nondiscriminatory terms -- would "substantially prevent the implementation of the requirements" of the unbundled elements portions of the Act and the "purposes" of those requirements.

3. The BOCs contend that the FCC has no *review or enforcement* power absent states' failure to act, and that the Commission cannot review state decisions as to what performance standards are appropriate. The Eighth Circuit held, according to BellSouth, that the FCC cannot dictate the terms of interconnection agreements.

Response: As noted above, the court explicitly held that section 252(c)(1) requires state commissions to "ensure that arbitrated agreements comply with the Commission's regulations made pursuant to section 251 ..." States conduct arbitrations, but the terms of the agreements must be consistent with the FCC's substantive regulations concerning access to unbundled elements, including OSS. CLECs have not asked the FCC to *review* the terms of state arbitration decisions.

5. The BOCs argue that the Commission cannot require national standards under section 271; the most the FCC can do is require nondiscriminatory access.

Response: MCI has not asked for national standards. If, however, an individual ILEC fails to show why the LCUG recommendations require service greater than parity as applied to that ILEC, the LCUG recommendations should be used as default performance requirements.

MCI has not requested that the LCUG recommendations define parity nationally. In addition, the BOCs ignore the independent, minimum requirement of service on "reasonable" terms, which the FCC can define as part of its authority to promulgate rules needed to establish access to unbundled network elements.

Moreover, as the Commission confirmed in the Ameritech decision, the Eighth Circuit's decision has no impact on the standards the Commission can require for purposes of section 271.

6. SWBT argues that:

a) Sections 252(c) & (d) require state commissions, not the FCC, to establish rates;

b) Section 252(c)(3) delegates to state commissions the power to provide schedules for *implementation* of terms and conditions of interconnection agreements;

c) The FCC cannot review state commission determinations in arbitration agreements or enforce agreements; and

d) The 8th Cir. held that FCC cannot pre-empt any regulation, order or policy of a state commission; and

therefore, that the FCC cannot enforce implementation of agreements nor rewrite agreements. The only power the FCC has, BellSouth argues, is to declare that OSS is an unbundled element, but it cannot promulgate rules relating to "implementation of access" or interfere with state implementation schedules.

Response: This argument misstates the court's holding as well as the relief CLECs seek, and the conclusion does not follow. The BOCs incorrectly assume that section 252(c)(3) concerning <u>implementation schedules</u> somehow overrides section 252(c)(1). The authority to derive rules concerning performance standards does not in any way derive from the Act's provisions concerning implementation schedules. CLECs have not requested an "implementation schedule" as part of the rulemaking establishing performance measures. The issue of implementation schedules is a red herring.

Moreover, the court explicitly upheld the <u>separate</u> requirements of section 252(c)(1), which requires state commissions arbitrating interconnection agreements to comply with FCC regulations. Because the performance rules fall within one of the six areas for which the FCC has

rulemaking authority (unbundled elements), any arbitration decision or term in an arbitration agreement that is inconsistent with the FCC's rules is invalid.